IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No.1212 of 2005
with
Civil Application No.1680 of 2005

Shamrao Krishna Bhosale ..Appellant

vs.

Housabai Krishna Kasote ..Respondent

Mr.P.R.Arjunwadkar for appellant.
Mr.Amit Borkar for respondent.

CORAM: S.C.DHARMADHIKARI J.
14th August, 2007

P.C.

1. Heard Mr.Arjunwadkar appearing for the appellant and Mr.Borkar appearing for the respondents.

2. The respondent/original plaintiff filed Reg.Civil Suit No.273 of 1994 which has been decreed by the Trial Court on 17th July, 1999. The decree is of permanent injunction restraining the present appellant/original defendant not to disturb the peaceful possession in respect of the suit property and to remove the construction described in para 2 of the plaint.

3. That decree has been confirmed by the lower Appellate Court on 11th April, 2005 in Reg.Civil Appeal no.370 of 1999. The appellant/Original Defendant has preferred the

present second appeal.

4. The only contention urged on behalf of the appellant in support of the plea that the substantial question of law which arises is that the respondent/original plaintiff was aware of the construction. Once the plaintiff was so aware then she could not have filed the suit after considerable lapse of time. The principle of acquiescence would come into play and, therefore, the suit for permanent injunction should not have been decreed. The Courts below erred in decreeing the same and that is how this Court should entertain the second appeal.

5. The Courts below have relied upon the deposition of the son of the respondent. He has specifically deposed that the city survey no.4 which is the suit property is the house surrounded by open space. C.S.No.3 is open space. Both the properties are situated within the limits of Municipal Council. After tracing the title of the respondents through the Gift Deed and sale deed, it is pointed out that these properties are entered in the name of the respondent/original plaintiff and she is paying the municipal taxes. Thus, the ownership and possession was proved.

6. The Courts below also have relied upon Exh.81 which is a map. The map has been relied upon in addition to the oral deposition of the plaintiff's son and one witness Babu Ramu Mane. This is clear case where encroachment was made by the appellant on certain portion of the respondent's property thereby causing obstruction in the peaceful possession of the respondent/original plaintiff. The Courts below have concluded that the encroachment committed is a very recent one. In such circumstances and when the plea of adverse possession raised on behalf of the appellant/original defendant has been rejected through out, in my view, entertaining the present second appeal would mean reappreciating and reappraising the material on record which is impermissible in law. This is not a case where the plaintiff could be said to have acquiesced in the construction or acts of the respondent/tenant/original defendant. The construction has found to be recent one. It is not a case which is covered by the decision relied upon i.e. A.I.R.1981 Madras 220 (R.S.Muthuswami Gounder Vs. A.Annamalai and others). The said decision is clearly distinguishable on facts. There is no merit in the second appeal which is accordingly dismissed.

7. In view of dismissal of the second appeal the civil application no.1680 of 2005 does not survive and is

disposed of accordingly.

(S.C.DHARMADHIKARI J.)